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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioners are independent insurers which provide annuity contracts to employees of colleges and universities through insured pension plans. Each such annuity contract provides that lifetime benefits will be based upon mortality tables which reflect the conceded fact that women as a group will live longer than a group of similarly situated men. As a result, while contributions to such annuity contracts are equal, under certain payment options women will receive benefits that are lower periodically (though equal in value) to benefits received by similarly situated men. The questions presented are:

1. Whether an insurer's provision of lifetime pension plan benefits which accords similarly situated male and female annuitants equal value for each dollar contributed based upon their expected longevity discriminates on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.* (1976 & Supp. IV 1980)).

2. Whether Title VII applies to the activities of third-party insurers when such insurers have no employer-employee relationship with their annuitants and the annuitants' employer has no control over the insurers' use of mortality tables.

3. Whether the protection from unintended federal intervention into the "business of insurance" provided by the McCarran-Ferguson Act (15 U.S.C. §§ 1011 *et seq.* (1976)) here exempts TIAA and CREF (and thus the colleges and universities) from Title VII application.

4. Whether the use of sex-distinct mortality tables by petitioner-insurers constitutes discriminatory treatment of women under Title VII in the absence of any proof of discriminatory intent or pretext.

5. Whether an order requiring periodic annuity benefits to be made equal as between similarly situated men and women retiring after May 1, 1980, grants impermissible retroactive relief when such equalization is to be accomplished through a reduction in men's benefits derived from contributions made in the past.

PARTIES TO THE PROCEEDING

In addition to the petitioners* and respondents listed in the caption, the following are also respondents herein: Long Island University; Albert B. Lewis in his capacity as Superintendent of Insurance of the State of New York; the Equal Employment Opportunity Commission (intervenor); and American Association of University Professors (intervenor).

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* Pursuant to Rule 28.1 of this Court, petitioners state as follows: (1) *Parents.* All of TIAA's capital stock is held by Trustees of TIAA Stock, a not-for-profit, non-stock, New York membership corporation. CREF itself is a not-for-profit, non-stock, New York membership corporation. Seven persons serve both as members of CREF and of Trustees of TIAA Stock. (2) *Non-wholly owned subsidiaries and affiliates.* TIAA owns 50% of the issued and outstanding stock of North Coast Investment Corporation, a Delaware corporation.

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DIANA L. SPIRT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 29, 1982. For the reasons assigned herein (pp. 11-13, infra) should certiorari be granted, petitioners respectfully request that this case be set for argument on the same date as argument is heard in *Arizona Governing Committee* v. *Norris*, *cert. granted*, 51 U.S.L.W. 3287 (U.S. October 12, 1982) (No. 82-52), and that an expedited briefing schedule be adopted, if necessary.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 29 Fair Empl. Prac. Cas. (BNA) 1599 and 30 Empl. Prac. Dec. (CCH) ¶ 33,072, appears in the separately bound Appendix filed with the Petition.[1] In addition to its Judgment, the District Court issued five opinions in this case (all of which appear in the Appendix): (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (on limited remand; reported at 93 F.R.D. 627).

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was filed on September 29, 1982. This Petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Involved herein are:

(1) Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (1976)) which in pertinent part provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

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1 Citations herein to material printed in the Appendix appear as "__a."

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

(2) Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1976), which in pertinent part provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

The full text of these provisions, and other relevant portions of Title VII, the McCarran-Ferguson Act, and the Portal-to-Portal Act (29 U.S.C. § 259 (1976)), are set out in full in the Appendix.

STATEMENT OF THE CASE

A. Description of the Parties and the TIAA-CREF Annuity System[2]

Petitioners TIAA and CREF provide a variety of insurance products, principally annuities, for employees of educational and research institutions through insured pension plans. TIAA is a non-profit legal reserve life insurance and annuity company organized under New York law in 1918, and offers fixed dollar annuities. CREF is a not-for-profit corporation created in 1952 by a special act of the New York legislature as a companion organiza-

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2 The facts were either largely stipulated to or were contained in uncontested affidavits filed by TIAA-CREF. Citations herein to material contained in the Joint Appendix filed below appear as "JA__."

tion to TIAA, to offer variable annuities. 3-5a. Both TIAA and CREF are closely regulated by the New York State Insurance Department and subject to the New York Insurance Law. JA185.

Respondent Diana Spirt is a tenured professor at Long Island University ("LIU"). Tenured LIU faculty are required to participate in the University's retirement plan which is funded by contributions made, by and on behalf of such faculty, to TIAA and CREF annuity contracts. 3-4a. Those contributions are equal for all similarly situated men and women, and result in equal accumulations at retirement. JA175.

The annuity contracts involved are between each individual participant and TIAA-CREF, not with the employer LIU. JA174. Neither LIU nor any other participating institution has authority or control over the terms of the TIAA-CREF contracts or over TIAA-CREF's mortality tables or rate schedules, which are submitted to, and have received the approval of, the New York State Superintendent of Insurance. JA174, 180-83. More than 700,000 persons presently have contracts with TIAA-CREF and more than 3,400 institutions have TIAA-CREF retirement plans. All contributions are immediately vested and credited, as received, to individual accounts established for each employee by TIAA-CREF, and from which benefits are ultimately paid. JA175. Employees retain those benefits wherever they may transfer employment, in or out of higher education. 4a.

B. Annuity Principles

In order to determine the periodic fixed amount of annuity payment from TIAA and the periodic fixed number of annuity units from CREF, payable for as long

as an annuitant may live, TIAA-CREF, like any insurer, must be able to determine in advance the period over which benefits are expected to be paid. JA372. Although no one can determine in advance how long any individual will live, an insurer (through the use of a mortality table) can predict how many deaths will occur each year within a large group of persons presenting similar risk characteristics, and thus can obligate itself to provide lifetime benefits to each individual in that group.

In order that annuitants may receive in benefits the full (*i.e.*, equitable) value of premiums paid, and the earnings thereon, in light of the risks they present, the insurer engages in a process known as risk classification whereby persons are grouped according to the degree of risk (here, anticipated longevity) presented. JA372-73, 315-18. Each person within the group so established pays the same premium and is entitled to benefits of the same value. JA179-80. The only stable, significant and objectively measurable risk classification factors for annuitant longevity are age and sex. As do all companies issuing annuities, TIAA-CREF rely on these two factors. JA377-78, 713-15.

TIAA-CREF's studies of its own annuitants' lives, and every other similar study known to them, show that at every age, the male mortality rate is greater than the female mortality rate. JA180-82. Because the group of women live more years than similarly situated men, given equal accumulations at retirement, lifetime annuity benefits must be paid at a lower periodic rate to the women in order to avoid exhausting the funds accumulated by and for them while many of them are still living. JA360-63.

C. Proceedings Below

Plaintiff brought this action in 1974 alleging that TIAA-CREF's use of sex-distinct mortality tables violated, *inter alia,* Title VII and 42 U.S.C. §§ 1981 *et seq.* JA14. The jurisdiction of the district court was invoked under Title VII, as amended (42 U.S.C. §§ 2000e *et seq.*), the Civil Rights Act of 1870 (42 U.S.C. §§ 1981 *et seq.*), The Fair Labor Standards Act, as amended (29 U.S.C. § 206(d)), and under 28 U.S.C. §§ 1331 and 1343. (*Id.*)

In an opinion dated August 9, 1979, the district court granted summary judgment in favor of TIAA on the ground that the McCarran-Ferguson Act prevented the application of Title VII to that insurer. 53a. Holding that CREF is not engaged in the "business of insurance" within the meaning of that Act, the court applied Title VII to CREF and found that its use of sex-distinct mortality tables violated Title VII under the rationale of *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). The court enjoined CREF, on and after May 1, 1980, from using sex-distinct mortality tables in calculating the benefits to which participants would be entitled at retirement. Finally, the court also enjoined LIU from contributing, or requiring its employees to contribute to, any retirement plan which used sex distinct mortality tables in the calculation of periodic benefits. All parties filed notices of appeal from this decision.

In February, 1981, Albert B. Lewis, Superintendent of Insurance of the State of New York, was made a supplemental defendant to this proceeding (then before the district court on limited remand) by reason of his rejection, as inconsistent with New York law, of a merged-gender, *i.e.*, "unisex," mortality table proposed for prospective use by TIAA-CREF. JA442. In an opinion dated March 19, 1982, the district court, *inter alia*, denied

TIAA-CREF's motion to amend the judgment and denied plaintiff's motion for summary judgment against defendant Lewis. 82a.

On September 29, 1982, the Court of Appeals affirmed the district court's holding as to CREF, but reversed the finding below that McCarran-Ferguson exempted TIAA from Title VII liability under *Manhart*. 1a. The Court also held that the required "equalization" in annuity benefits ordered by the district court was not impermissibly retroactive. Such equalization was endorsed even though it was to be accomplished, contrary to the express terms of the participants' annuity contracts, by ignoring sex as a risk classification factor and by reducing the benefits, resulting from contributions made in the past, to be received by males.

On October 14, 1982, the Sixth Circuit Court of Appeals found that TIAA-CREF's use of sex-distinct mortality tables did not violate Title VII in *Peters* v. *Wayne State University*, Nos. 79-1658, -1670, -1671.

REASONS FOR GRANTING THE WRIT

I. There Is A Direct Conflict Between The Circuits As To Whether TIAA-CREF's Use Of Sex-Distinct Mortality Tables Violates Title VII

Two circuits, in opinions hardly more than two weeks apart, have come to precisely opposite conclusions in deciding whether TIAA-CREF's use of sex-distinct mortality tables violates Title VII. Both decisions directly involve the same retirement system, the same use of actuarial tables, the same alleged form of discrimination, and both directly consider the same authority—this Court's decision in *Manhart*—but reach opposite conclu-

sions on the issue of discrimination. As a result of these two decisions, TIAA-CREF have been enjoined from continuing the challenged use of sex-distinct tables by one court, while such use has been unequivocally endorsed by another. In these circumstances, we submit, the Court should exercise its jurisdiction and grant a writ of certiorari to resolve this conflict. *Union Labor Life Insurance Co.* v. *Pireno*, 50 U.S.L.W. 4911, 4912 (U.S. June 28, 1982); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252 (1981); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 190-91 (1974).

The issue here presented is an important one for the entire insurance and pension industries. At stake is the right to recognize lower female mortality in setting insurance and annuity rates, a universal practice among insurers based upon sound actuarial and insurance principles. Also at issue is the question whether Title VII has given federal agencies, such as the EEOC, the right to substitute their judgment in matters of insurance practices for that of officials charged by the various states with the task of such regulation.

Prompt resolution of the present impasse presented by the conflict between the Second and Sixth Circuits is of vital importance to the TIAA-CREF nationwide retirement system. TIAA-CREF is one of the ten largest insurers in the United States with assets exceeding $20 billion. Although organized in and subject (*inter alia*) to the laws of the State of New York, TIAA-CREF provide annuity contracts to employees of institutions of higher education in every state in the Union. One of the characteristics of this annuity system, and indeed one of its most often cited advantages, is its uniformity. The same basic contractual provisions and actuarial practices govern the relationship between TIAA-CREF and its participants no

matter where those participants are employed. Thus, the present conflict poses grave uncertainty in all unretired participants' annuity contracts and benefits, and in the administration of each participating institution's retirement plan.

A. The Decision in Spirt

The Court of Appeals below found that TIAA-CREF's use of sex-distinct mortality tables in setting annuity benefit rates violated Title VII. Such use was found by the Court to be proscribed by *Manhart* and other decisions, including the district court's decision in *Peters* v. *Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979). The Court below rejected TIAA-CREF's articulated justification for its use of sex-distinct benefit rates rooted in fundamental actuarial and insurance principles.

The Court also rejected petitioner's claim that they were not here "employers" within the meaning of Title VII and thus, by definition, not subject to its provisions. It held rather that TIAA-CREF must be "deemed" to be an "employer" (1) by reason of its relationship to the colleges and universities it serves and (2) in order not to frustrate the effectiveness of Title VII. 14-15a. The district court decision in the *Peters* case was again cited with approval in reaching this result. 15a.

Finally, as noted, the Court ordered that all TIAA-CREF participants retiring on or after May 1, 1980 receive periodic benefits equal to those received by similarly situated members of the opposite sex, regardless of (1) the contrary terms of the annuity contracts or (2) the fact that contributions supporting those benefits were made in the past, often over the last four or five decades. 27a.

B. The Decision in Peters

On October 14, 1982, the Sixth Circuit Court of Appeals decided *Peters* v. *Wayne State University,* a class action brought by women employed by Wayne State University ("WSU") who claimed that TIAA-CREF's use of sex-distinct mortality tables to calculate annuity benefit rates violated Title VII. The district court, as noted, had found such use to be discriminatory based almost exclusively on its reading of the *Manhart* decision. The Sixth Circuit reversed.[3]

The Sixth Circuit found the district court's holding that TIAA-CREF were "employers" within the meaning of Title VII (based upon TIAA-CREF's "ties" with WSU and those insurers' specialized clientele) to be "clearly erroneous." 138-39a. The Court rejected (citing *Manhart*) the suggestion that WSU had delegated responsibility for any aspect of employee compensation to TIAA-CREF or, absent any evidence of control, that TIAA-CREF was the "agent" of WSU. 139a.

In contrast to the Second Circuit's holding as to LIU, the Court in *Peters* found that WSU had no Title VII liability simply for choosing TIAA-CREF contracts as a funding vehicle for its retirement plan:

> We hold . . . that the use of sex-segregated mortality tables to calculate retirement annuities does not violate Title VII if the actuarial value of the annuities is equal for similarly situated women and men.

140a.

In contrast to the Second Circuit, no discriminatory treatment of, or impact on, women was found in the use

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3 The Sixth Circuit's decision, not yet officially reported, is set out in the Appendix hereto.

of separate tables because "the tables are sex-segregated simply because women live longer than men." 141a. The Court distinguished the factual situation which existed in, and gave rise to, the *Manhart* decision and, citing with approval this Court's decisions in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), found (144a) that:

> Wayne State's retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women.
>
> Common sense supports this holding.

C. The Importance of the Issue, The Relevance of *Norris*, and The Necessity for Clarification

A major purpose served by exercise of this Court's jurisdiction is the clarification of important previous decisions. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 569 (1978); *United States* v. *Gaddis*, 424 U.S. 544, 547 (1976). Here, the challenged use of sex-distinct mortality tables involves the application and scope of this Court's decision in *Manhart* and the proper interpretation of significant federal legislation and its effect on billions of dollars of retirement benefits for hundreds of thousands of people. The need for review of the Second Circuit's decision is compelling.

The importance of the issue is reflected in the fact that certiorari has recently been granted in *Arizona Governing Committee* v. *Norris* (No. 82-52). Although *Norris* and *Spirt* both involve the proper application of *Manhart*'s limited holding, *Norris'* chief concern is with the "open market" exception enunciated there. The "plans" at issue differ markedly—that in *Norris* is a completely voluntary

deferred compensation plan with a cash option, while that in *Spirt* is an insured pension plan requiring mandatory participation and providing lifetime annuity income but no cash option.

Spirt (and *Peters*[4]) present issues well beyond the narrower focus of *Norris*. The insurer's justification for the use of sex-distinct mortality tables is not involved in *Norris*. Independent insurers and the New York Superintendent of Insurance are parties in *Spirt*, and thus the operation of the McCarran-Ferguson Act, and Title VII's applicability outside the employer-employee context, are here squarely in issue though not in *Norris*. Similarly, the critical issue of the propriety of granting retroactive relief is raised in *Spirt*, but not in *Norris*.

Although a decision in *Norris* will undoubtedly involve clarification and application of *Manhart*, we do not believe that it could reasonably be expected to dispose of the significant and difficult issues not raised by *Norris* which are contained in *Spirt* or *Peters*. It is most important that this large insurance and annuity system, and the insurance and annuity industry generally, given conflicting instructions from two different circuits, be granted definitive guidance by this Court on the particular issues those conflicting decisions present. In reliance on *Manhart*, the Second Circuit has enjoined TIAA-CREF's use of sex-distinct mortality tables throughout the nation, including the Sixth Circuit, where such use is approved as consistent with *Manhart*. If full resolution of this conflict and full clarification of *Manhart* is to be achieved, we believe it appropriate that the issues in *Spirt* and *Peters* be briefed, argued and decided in the same context and not be left for later resolution in light of *Norris'* more limited

4 We understand that plaintiffs in *Peters* will shortly be filing a petition for certiorari to review the decision of the Sixth Circuit.

scope. To this end, we urge that certiorari be granted, and that the Court set argument in *Spirt* (and *Peters*) on the same date as argument is scheduled in *Norris*, pursuant to an expedited briefing schedule if necessary.

The significance of the issue is also evident from the large number of cases pending in the lower courts in which the issue of *Manhart*'s proper application has been raised and decided.[5] *See, e.g., Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235, 237 (1964). TIAA-CREF have themselves been named in some ten suits in various district courts, as well as in a number of federal and state administrative proceedings, all relating to the use of sex-distinct mortality tables.

Further, the inability of the Courts of Appeals to reach a common or consistent answer to the issues here presented, or to be able to apply the same authorities to achieve a common result, begs for the intervention of this

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5 In addition to *Spirt*, *Peters*, *Norris* and *EEOC* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978), the following cases have also applied *Manhart's* holdings: *Hannahs* v. *Teachers' Retirement Sys.*, 26 Fair Empl. Prac. Cas. (BNA) 527 (S.D.N.Y. 1981); *EEOC* v. *Wooster Brush Co.*, 523 F. Supp. 1256 (N.D. Ohio 1981), *appeal pending*; *Women in City Gov't United* v. *City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Probe* v. *State Teachers' Retirement Sys. and Teachers' Retirement Bd.*, 27 Fair Empl. Prac. Cas. (BNA) 1306 (C.D. Cal. 1981), *appeal pending*; *Retired Public Employees' Ass'n of Cal.* v. *Cal.*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. August 14, 1982) (No. 82-262); *Shaw* v. *Int'l Ass'n of Machinists & Aerospace Workers*, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980); *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979).

Court. In the *Colby* case, for example, the First Circuit's opinion was replete with questions the Court felt *Manhart* had not addressed. In foreseeing "difficulties, possibly very great difficulties, that did not arise in *Manhart*, in light of the Court's caveat that [Title VII] was not intended to revolutionize the industry" (589 F.2d at 1144), the Court commented (at 1143):

> Whether by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were.

In *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979), in addressing the "vexing" problems created by the presence of an independent insurer whose contracts provided for equal contributions but paid unequal periodic benefits to similarly situated men and women, the Court stated that "this [problem] results from the difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company."

In *Hannahs* v. *Teachers' Retirement System*, 26 Fair Empl. Prac. Cas. (BNA) 527, 534 (S.D.N.Y. 1981), the Court found that applying *Manhart's* admonition against retroactivity was "not an easy task." Judge Haight refused to grant relief on the record before him, seeing "inherent problems" in equalizing benefits for females by reducing males' benefits. In that regard he stated: "I am concerned that such an order would inequitably affect the male annuitants. . . ." *Id.*

A grant of certiorari to resolve the substantial questions left unanswered by *Manhart* is clearly indicated. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 404 (1979).

II. Certiorari Should Be Granted Because The Court Of Appeals Herein Has Decided Important Questions Of Federal Law In Conflict With Applicable Decisions Of This Court

A. The Court of Appeals Decision Has Improperly Expanded the Holding of This Court in Manhart

The *Manhart* decision was deliberately narrow in scope and limited in application to the particular parties and pension plan before the Court: "All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." (435 U.S. at 717). No private insurance company was involved in *Manhart* and particular care was taken to make it clear that "we do not suggest that [Title VII] was intended to revolutionize the insurance and pension industries." *Id.* These caveats to any wholesale application of *Manhart's* teaching were, however, ignored by the Second Circuit in *Spirt*.

The TIAA-CREF system differs markedly from the employer-operated pension plan involved in *Manhart*. TIAA and CREF are independent insurers regulated by the State of New York. TIAA and CREF issue separate contracts to each individual participant and establish individual accounts for each participant for the receipt of contributions. Contributions by and on behalf of all similarly situated participants at each institution are equal.

Manhart, on the other hand, presented a totally different situation. There the pension plan was established and operated by an employer. The plan itself was a typical defined benefit plan with no individual accounts for

employees.[6] The wages of the women were lower than that of similarly situated men because the contributions required of the women (deducted from their paychecks) were 15% greater than those required of similarly situated men. To ignore these distinctions as the Second Circuit did below is to invite chaos in the insurance and pension industry, the "revolution" which *Manhart* expressly sought to avoid.

i. TIAA-CRFF are not employers within the meaning of Title VII.

TIAA and CREF, companies with hundreds of thousands of participants at colleges and universities throughout the nation, clearly represent "the insurance and pension industries" carved out in *Manhart* for different treatment than that received by the employer-operated plan at issue there. As independent insurers, TIAA-CREF do not employ their participants, nor do the participants' employers control the risk classification and rate making activities of TIAA-CREF. In specifying that its retirement plan would be funded through TIAA and CREF contracts, the employer, LIU, did not create an agency relationship between itself and TIAA-CREF, nor did it make a sham delegation of its pension responsibili-

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6 Retirement benefits in such plans (equal for similarly situated men and women) are computed, not from individually accumulated amounts, but pursuant to a formula which normally establishes benefits as a percentage of the employee's final average salary. The cost to the employer to provide such equal benefits at retirement is greater for women than for similarly situated men. Such "formula benefit" plans by definition avoid the question of inequity or subsidization that arises from treating different classes of risks the same. *See, e.g., Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

ties to "corporate shells." *Manhart*, 435 U.S. at 718n.33. In ignoring these distinctions the Court of Appeals has improperly expanded the scope of Title VII and disregarded *Manhart*'s clear statement that "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." *Id.*

ii. The Court of Appeals improperly granted retroactive relief.

The Court of Appeals also disregarded *Manhart's* admonition against the imposition of retroactive relief. Rather the Court mandated that a portion of benefits resulting from males' vested past contributions, or earnings thereon, be taken from the men and given to the women in order to achieve an equalization of periodic benefits. The Court has, thus, "attach[ed] a new disability in respect to transactions * * * already past" through the reduction in value of each past contribution whenever made. *See Lohf* v. *Casey*, 330 F. Supp. 356, 359 (D. Colo. 1971), *aff'd*, 466 F.2d 618 (10th Cir. 1972).

In *Manhart* this Court refused to let stand an order which would have required the Department of Water & Power to return to the females any contributions they had paid in excess of those paid by similarly situated males. Here the Second Circuit found retroactive relief appropriate, *Manhart* notwithstanding, because (1) TIAA-CREF have supposedly been on notice as to the "questionability of the practices" since 1974, and (2) the relief granted in *Spirt* was not nearly so "drastic" as that at issue in *Manhart*, because the extra money to increase women's benefits would come from the males, not from TIAA-CREF reserves. 22-24a.

The Court below has read *Manhart*'s admonitions on retroactivity too narrowly. Being "on notice" of claims of discrimination can hardly constitute a basis for deciding that retroactive relief should be imposed. Moreover, the Court of Appeals decision would affect contributions made long before Title VII was enacted, or the use of sex-distinct tables was questioned. The TIAA contracts, the CREF certificates, and other materials provided throughout the years to TIAA-CREF participants, set forth those insurers' obligation to use sex and age as risk classification factors. JA501, 505, 513.

Far from being less "drastic" in its impact, the decision below would presently mandate the transfer in the TIAA-CREF system alone of some $2 billion in benefits from males to females over the course of the males' retired lives. *See* JA565. Discretionary investments by males in TIAA-CREF through voluntary contributions would also be subject to the operation of unisex tables under the Court of Appeals decision. All this would be achieved without the men being represented at any level of the proceedings below[7] and in the face of that Court's holding that "each employee has an immediate property interest in the benefits that accrue by virtue of the contributions made on the employee's behalf." 4a. Such a marked departure from the dictates of *Manhart*,[8] with the

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7 TIAA-CREF's motion to have men in its system joined as indispensable parties was denied by the district court. Although the issue was raised on appeal, it was not addressed by the Second Circuit.

8 Such an award also violates the "good faith reliance" provisions of Title VII (42 U.S.C. § 2000e-12(b) (1976)) and the Portal-to-Portal Act (29 U.S.C. § 259 (1976)), and the Title VII limitation on awards of back pay (42 U.S.C. § 2000e-5(g) (1976)).

consequences outlined above, merits review of the decision below. *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 219 (1967); *Wilson* v. *Schnettler*, 365 U.S. 381, 383 (1961).

B. The Court of Appeals Decision Has Redefined the Applicability of the McCarran-Ferguson Act

The Court of Appeals decision completely redefines and severely limits the scope of the McCarran-Ferguson Act. Although the Court undertook to decide whether Title VII "specifically relates" to the business of insurance (a criterion for McCarran application), it never did so. The Court rather decided (based largely on two recent district court decisions) that the phrase "[n]o Act of Congress" in the statute was "primarily" meant to apply to the federal antitrust laws and was not intended to include "subsequently enacted civil rights legislation." Such a wholesale revision of the plain words of the Act, given the obvious significance of the change to insurers and the states, can only be undertaken by Congress.

The Court's decision has substituted confusion where clarity formerly existed by entirely exempting from the Act's scope an ill-defined body of federal legislation. "No Act of Congress" has become "Some Acts of Congress," with an enormous potential impact on the insurance industry and state regulation of insurance. Insurers can no longer be confident that, once engaged in the business of insurance and acting in accord with state insurance law, they will not be subject, as well, to all varieties of federal legislation enacted since 1945 which might arguably apply to their insurance activities.

An example of the state-federal conflict which McCarran was meant to avoid is present here. The plaintiff and the EEOC have sued the New York Superintendent of Insurance because of his disapproval, as inconsistent with New York law, of a merged-gender mortality table proposed for prospective use by TIAA-CREF in 1981. The EEOC seeks to substitute its own views of the proper regulation of these insurers for that of the highest state official in New York specifically charged with that task under New York law. The interest of the states in the proper regulation of insurance, the expressed rationale for the Act (*see* 15 U.S.C. § 1011 (1976); 146a), is thus threatened.

The Court further held, exclusively on the basis of *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959), that CREF was not engaged in the "business of insurance" because its contracts did not subject it to "investment risk." This result was endorsed despite the fact that TIAA (whose annuities carry a guaranteed return and thus subject it to investment risk) and CREF share common management, engage in the same risk classification and risk spreading activities, and are both closely regulated by the State of New York.

The risk classification and risk spreading activities of CREF, moreover, clearly qualify it as being engaged in the "business of insurance" within the meaning of the Act in light of this Court's recent decisions in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Insurance Co.* v. *Pireno, supra*.

The interest of the states in the regulation of the business of insurance unfettered by unintended federal

intervention[9] would here be best served by application of the Act to CREF as well as TIAA. That interest, further, should extend to those who deal with insurers, such as LIU. To enjoin LIU, as the Court did below, from dealing with TIAA or CREF, when those companies, their activities and insurance products, are otherwise entitled to the Act's protection, is to permit indirect outside regulation of those insurers when the Act would forbid direct regulation. If the Act is to serve its stated function, those who deal with insurers under the Act should be free to purchase products offered by them which have been found to be non-discriminatory by the State.

C. The Court of Appeals Ignored Plaintiff's Failure to Demonstrate the Requisite Discriminatory Intent in This Disparate Treatment Case

The Second Circuit completely ignored the rule requiring that plaintiffs show proof of discriminatory intent in order to prevail in Title VII disparate treatment cases. *E.g., Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Indeed, the Court did not even mention the intent issue although it was squarely raised.

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9 The New York Superintendent of Insurance has termed the prospect that CREF would not be subject to the Act, but rather under the supervision of federal agencies with no insurance expertise such as the EEOC, an "intolerable" intrusion into that Department's ability to regulate insurers. (JA635). The same reasoning would, of course, apply to TIAA as well.

No showing of discriminatory intent has been made here. See JA179-80, 373. A similar result obtained in *Peters*, leading the Sixth Circuit to state (141-42a):

> Plaintiffs failed to carry their ultimate burden of persuasion under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way . . . . Wayne State has not violated Title VII according to a disparate treatment analysis.

CONCLUSION

For all the foregoing reasons, we urge that a writ of certiorari issue and the case be set down for argument on the same date as *Norris*, pursuant to an expedited briefing schedule if necessary.

Respectfully submitted,

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